The Central Law Journal.

SAINT LOUIS, NOVEMBER 15, 1878.

CURRENT TOPICS.

The liability of persons having the possession and control of tenements for damage caused by water negligently allowed to escape, was considered in the Supreme Court of Maine in the late case of *Simonton v. Long*. The plaintiffs with their stock of goods occupied the first floor, and the defendants the hall in the third story, together with the appurtenances thereto, including a urinal supplied with water. The faucet in the closet regulating the flow of the water into the urinal having been left wide open, and the efflux, from some cause, not being equal to the influx, the water overflowed the bowl and flooded the plaintiffs' store and injured his stock. The pipe which supplied the water was only one-third as large as the waste pipe, and the amount of water which passed through it at any time depended upon the head and consequent pressure. The plumber testified that "if no cigar-stump, tobacco-quid, or other obstruction got into the bowl, with an ordinary pressure of water it would not run over;" but "you could get pressure enough to run it over;" that the greatest pressure came at night. And if the self-acting stop-cock had been put in just before, instead of soon after the time of the overflow, there would have been no overflow. The defendants were held liable for the damage. In Moore v. Noedel, 34 N. Y., 527, the court says: "In such a case where the occupation and right to use the water fixtures are exclusive, the party is responsible for their proper use and proper care." The English cases holding a party who stores water on his own premises absolutely liable for its escape unless excused by the act of God or *vis major* are Fletcher v. Rylands, 1 Exch. 265, 3 H. L. 330; Smith v. Fletcher, 7 Exch. 305; Nichols v. Marsland, L. R. 2 Exch. Div. (C. A.) 1, 4 Cent. L. J. 319. This doctrine has received a *quasi* approval in Ball v. Nye, 99 Mass. 582; and in Wilson v. New Bedford, 108 Mass. 261, 266; while it has been criticised in Swett v. Cutts, 50 N. H. 437; and in Brown v. Collins, 53 Ib. 442; and utterly denied in Losee v. Buchanan, 51 N. Y. 476, 486. As to the use of fire, see Bachelder v. Heagan, 18 Me. 32; and Hewey v. Nourse, 54 Ib. 256. As to the use of gas, see Holly v. Gas Light Co., 8 Gray, 123; and Hunt v. Gas Light Co. 1 Allen, 343.

In *Uquehart v. Brayton*, 18 Alb. L. J. 371, before the Supreme Court of Rhode Island, A had made three successive mortgages of his realty to B, C, and D. He then sold his realty to E, describing the mortgages in his deed of conveyance, and adding the words, "which said mortgages are hereby assumed by E, as part of the consideration of this deed." Subsequently B, the first mortgagee, sold the realty under the powers of his mortgage. D, the third mortgagee, then brought *assumpsit* against E, the purchaser from A, for the amount of A's mortgage note to D. The question was whether the agreement between the defendant and the grantor inured to the benefit of the plaintiff as one of the mortgagees, so as to enable him to sue the defendant directly, in other words, whether it created any privity of contract between them. The court held that D was entitled to recover. The decisions on this question are conflicting, but many of the more recent cases support the right of the mortgagee to maintain the action. Burr v. Beers, 24 N. Y. 178; Lawrence v. Fox, 20 id. 268; Joslin v. New Jersey Car Spring Co., 26 N. J. Law, 141; Bassett v. Hughes, 5 Reporter, 634; Twichell v. Mears, 6 id. 40; Lamb. v. Tucker, 42 Iowa, 118; Putney v. Farnham, 27 Wis. 187; Bristow v. Lane 21 Ill. 194; Bohanan v. Pope, 42 Me. 93; Vrooman v. Turner, 8 Hun, 78; Brown v. Roger Williams Ins. Co., 5 R. I. 394; Motley v. Manufacturers' Ins. Co., 29 Me. 337; Carnegie v. Morrison 2 Metc. 381; Brewer v. Dyer, 7 Cush. 337; but *contra*, see Mellen v. Whipple, 1 Gray, 317; and Crowell v. Currier, 27 N. J. Eq. 152, the right of action being denied in the latter case, however, solely on the ground that a promise implied from the acceptance of a deed is a specialty. "The ground of decision" said the court "is variously stated in these cases. It is sometimes broadly maintained that when one person contracts with another for the benefit of a third, the latter, though not privy to the considera-

tion nor cognizant of the contract when made, may yet maintain an action upon it. It is sometimes argued that the grantee's retention of a part of the price, on agreeing to pay the grantor's debt, makes the money retained a sort of trust fund, as to which the law implies a promise in favor of the creditor: or, again, it is said the promise may be regarded as made to the creditor through the medium of the grantor acting as his agent, so that, when he is informed of it, he may ratify and adopt it. This is equivalent to regarding the transaction as a novation, or, if not, we think it may be so regarded. The case stands thus: B is indebted to A. B sells land to C, who agrees, instead of paying the price in full, to assume the debt, or to become A's debtor in lieu of B. If A were present assenting, the novation would be consummated on the instant, but A, being absent, learns of the agreement afterward and assents to it by bringing his action. Why may we not hold the novation consummated by the assent so given, as effectually as if given on the instant? If it be said that in order to create a privity between A and C the assent must be mutual, the answer is that C had already assented, and there was nothing wanting but A's assent to perfect the novation. To reach such a conclusion it is only necessary to make certain presumptions which are so appropriate to the nature of the transaction that the law can readily allow them."

In *Perkins v. Guy*, recently decided by the Supreme Court of Mississippi, the question was elaborately argued whether the statute of limitations of the place in which a contract is made can be pleaded in bar in a foreign jurisdiction where both parties were resident in the former place during the whole statutory time. The court decided in the affirmative. The common-law rule was that the time of the limitation of actions on contracts depends on the law of the forum, and not on the law of the state or country where the contract was made. In 1705 the lord keeper applied the English statute to a judgment which had been recovered in France. Duplex v. De Rosen, 2 Vern. 540. In an early case at law, Williams v. Jones, 13 East, 439, Lord Ellenborough made the distinction which has ever since been followed in England. According to the law received in the foreign court, there was only an extinction of the *remedy*, "but there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate, by comity, as an extinction of the remedy here also." "If it go to the extinction of the right itself, the case may be different." In one of the earliest cases in New York, the defendant pleaded in bar the statute of New York, which was six years; the plaintiff replied that the contract was made in Connecticut, where the statute was seventeen years. The court applied the New York statute. In the case of LeRoy v. Crowninshield, 2 Mason, 157, Mr. Justice Story stated, as the inclination of his mind, that where the remedy was completely barred by the "*lex loci contractus*, there was a virtual extinction of the right, which ought to be recognized in every other tribunal." But many years afterwards, perhaps after fuller investigation, and more mature consideration, the same eminent jurist, in the Conflict of Laws, said: "That, as the law of prescription of a particular country, even where the contract is made in such country, forms no part of the contract itself, but merely acts upon it *ex post facto*, in case of a suit, it cannot properly be deemed a right stipulated for, or included in the contract." Mr. Angell, in his work on Limitations, page 63, section 66, says: "The doctrine of the common law, beyond all doubt, is firmly fixed, that the limitation prescribed by the *lex fori*, in respect of remedies, must prevail in all cases of personal actions." In an elaborate note appended to the report of Andrews v. Herriott, 4 Cow. 510, is a copious collection of the authorities on the subject. The case of Townsend v. Jamison, 9 How. 407, presented the precise question, whether a cause of action having accrued in Mississippi, and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana; and the decision was that it could not. That is the settled rule in the Federal judiciary. McMoyle v. Cohen, 13 Pet. 312; McCluny v. Silliman, 3 Pet. 276; Hawkins v. Barney, 5 Pet. 457; Bank of United States v. Donnally, 8 Pet. 361. In the course of the judgment in Townsend v. Jamison, *supra*, the learned judge said: "It has become a fixed rule of the *jus gentium*

privatum, unalterable, in our opinion, either in the states of the United States, or England, except by legislative enactment."

USAGES OF TRADE.

Usages of a particular business become so well known and universal as to be, as it were, the laws of the trade, and as such are entitled to careful consideration by the courts in order to ascertain the true intention of parties to business contracts.

A custom or usage to become a part of a contract must be so far established and so far known to the parties that it must be supposed that their contract was made with reference to it. For this purpose the custom must be established and not casual—uniform and not varying—general and not personal, and *known to the parties*. Sipperly v. Stewart, 50 Barb. 62. Therefore, a custom to be good must be general, uniform, certain and notorious, and to be binding on parties to a transaction must be directly known to them, or so universal and general in its character that knowledge may well be presumed. Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. Southwestern Freight Co. v. Stanard, 44 Mo. 71.

The Delaware Court gives us the following closely-drawn distinction between usages and customs: "The one must be ancient, even from time immemorial; it is sufficient for the other if it be established, known, certain, uniform and legal. For the purpose of ascertaining the otherwise uncertain meaning of the parties where there is no special contract, such a usage even of a particular person may be proved if it be generally known." Townsend v. Whitby, 5 Harr. 55. But a certain person or class of persons can not establish a usage which may result in injury to other persons or classes, even though it may be general. Thus, if all the railroads in the country were to establish a custom which was unreasonable or dangerous, the generality of the custom will not justify them in case of accident. Hill v. R. R. Co., 55 Me. 438. Proof of knowledge or of facts from which it can be inferred is necessary. Boardman v. Gaillard, 1 Hun, 217. But evidence that a firm had sold according "to the usual and customary method," was held to be sufficient from which to infer that those engaged in the same business had knowledge of it, for the usages of a particular trade or business are presumed to be known by those engaged in it. Carter v. Coal Co., 77 Pa. St. 286.

A usage of a particular trade may sometimes be proved with a view of raising the presumption that the parties contracted with knowledge of and reference to it, so that it entered into and became part of the contract. In such a case it must be shown that the party against whom the usage is set up had notice of it at the time of making the contract, or it must be shown to have been so long continued universal and notorious that all persons may be presumed to have notice of it. Wadley v. Davis, 63 Barb. 503. But usage of trade is a matter of fact and not of opinion; it must be proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation and experience, and not by their conclusions or inferences, as to its effect either upon the contract or the legal rights of the parties. Haskin v. Warren, 115 Mass. 514.

Usage is not to be used to engraft on a contract or sale an obligation different from, or inconsistent with, the rule of the common law on the subject (ib), and it must be in opposition to no statute (Walker v. Trans Co., 3 Wall. 150), or against public policy. 42 Pa. St. 159.

Local customs may be proved with a view of explaining the meaning of particular terms in a written contract, but not to alter its legal effect, for the beauty of the law consists in its uniformity, and, to allow each neighborhood to make its own laws, would be to destroy the law (Dewees v. Lockhart, 1 Texas, 535); thus, a custom by which a man may obtain usurious interest is not good. Greene v. Tyler 39 Pa. St. 361.

In the drawing up of legal papers usage must be regarded especially in the matter of deeds which will be construed by usage. Kirkendall v. Mitchell, 3 McLean, 144.

Lex loci is particularly applicable to usages, for it is only because the custom is supposed to have influenced the parties who act within the sphere of its operation, that it is admissi-

ble at all. It must, therefore, be clearly shown that the custom existed at the place where, and time when, the contract or act sought to be affected by it was made or performed. It is only in some exceptional cases that proof of a usage in one place is allowed to show that it existed in another. Walker v. Barron, 6 Minn. 508. The Delaware court, in regard to generality and place, say: "There can be no doubt that the known and received usage of a particular trade and the established course of commercial dealings under it are tacitly annexed to the terms, and constitute a part of a commercial contract. As, for instance, although a draft is on the face of it made payable at a future day certain, yet the three days of grace, according to the known and established custom of merchants, are understood to be annexed to, and constitute a part of the contract. And yet, even quite a number of banks or mercantile firms or houses in a large commercial city, cannot, by their practice, establish a commercial usage, so as to make it binding as such on the trading community generally. The established custom or usage of a trade is the law of that trade, but it does not follow that, because a custom or usage is recognized as obligatory in Philadelphia or New York, that it is recognized as such in Baltimore or New Orleans, or has any force or effect in those cities. The custom or usage in one state may not be the same as in another. The states of the Union, in regard to commercial purposes, stand in the relation of foreign states to each other, so that a custom or usage in one state is not necessarily binding or obligatory upon persons engaged in the same business in another state. And in absence of affirmatory proof you cannot presume the existence of a usage." Mears v. Waples, 3 Houst. 581. However a custom may be proved to exist in all states, or if a custom is not general but confined, even to a certain individual, and is *certain* and known to the contracting party, we think such a custom would have the same force as though it were universal, and the contract would be presumed to have been made with reference to it. Where a man ordered glass a certain size, and they sent it according to the custom of measurement at the place of manufacture which was entirely different from the custom in the place the glass was ordered, the court held that he had it to pay for though he could not use it, as the custom of the place of manufacture would govern before the place of sale. Glass Co. v. Morey, 108 Mass. 570. Thus, his troubled spirit was compelled to be calmed by the sight of a lot of peculiar-sized glass, which he had no use for and knew no one who had—his only hope of even partial deliverance, the likelihood of some travelling vendor of glass-cutters, wanting it for practicing material, which was but slight consolation to his wounded spirit and lightened purse.

The only safe way, if you want a peculiar sized article, is to be very sure of the size it will be according to the rule of the place of manufacture, or you may find it comes rather more peculiar in size than you desired.

Boats must conform strictly to the usage of the river, and the descending boat may act under the presumption that the other does not intend to run into her, when the ascending boat has choice of sides (Barret v. Williamson, 4 McLean 589,) and this usage will be used in determining questions of negligence (Myers v. Perry, 1 La. An 372,) as each party must not only comply but presume that others will comply with such custom. Drew v. The Chesapeake, 2 Doug. (Mich.) 33. A custom which holds a person liable for one-half the expense of a party wall is good. 3 Rich. (S. C.) 283. A custom will control the liability of carriers, but to relieve a carrier both the custom and the employer's knowledge must be clearly proven, or at least that it was sufficiently notorious to raise a clear presumption of knowledge. McMasters v. R. R. Co., 69 Pa. St. 374. "Where an agent receives no instructions, he must conform to the usages of the trade or custom applicable to the particular agency; and any deviation therefrom, unless it be justified by the necessity of the case, will render him liable for all loss or injury resulting from it. Thus, if an agent should sell goods on credit when the usage was to make such sales for cash or should omit to present notes taken by him for payment; or should allow further time for the payment of them after they became due; he would be personally responsible. So also if following the usage, he should appoint a sub-agent, the sub-agent would in like manner be responsible. Yet if the compliance with such usage would in a particular case be injurious to the interests of his principal, he will not only not be

bound to comply with it, but if he do, knowing that it will be productive of injurious results, he will render himself personally liable therefor. Thus if an agent should store the goods of his principal in a place which he knew to be dangerous or improper, he would not be justified although similar goods were stored in similar places." 1 Story on Con. 236.

"A usage repugnant to the terms and objects of a written contract is not competent ot control it; as a usage for a master cooper to send his apprentice abroad on a whaling voyage, and receive his earnings on such voyage; or where by the terms of a contract to manufacture bricks, the bricks when made were the joint property of the contracting parties, that one of the parties had no interest in them; or in a written contract for the manufacture of retorts, that founders in the absence of an express agreement, should not be held to warrant their castings against latent defects, or in case of apparent defects, they were entitled to have them returned to them in a reasonable time; or when the contract of pledge of stock only provided that it might be transferred after default that it might be transferred at the pleasure of the holder; or where by a policy of insurance the re-insurer is to make a full indemnity within the amount of risk taken by him, that he is chargeable only for such proportion of the loss as the amount of re-insurance bears to the original policy; or for an insurance company, in case of a total loss, to retain two per cent. per month on the balance of the premium notes from the date of the last assessment until the expiration of the terms of the policy, when such usage limits and controls the terms of the policy. So no usage can be sustained in opposition to the established principles of law, as a usage to return a portion of a premium note when the insurance is effected on a cargo from a particular port to a foreign port and back, if the vessel fails to get a return cargo; or, that a vessel warranted to be neutral is not neutral, but only pretended to be; or to shorten the time of presentment, demand, and notice in respect to promissory notes within that fixed by law applicable to such a class of notes; or to make the seller of manufactured goods by sample liable to the purchaser for damages occasioned by latent defects in the goods sold, not discoverable either in them or the sample by ordinary care; or for the master of a stranded ship to sell the cargo without necessity.

"So also the law refuses to give its sanction to a usage that is absurd or unreasonable, as a usage of ship owners to pay the seamen's advance wages to their own shipping agent, employed to procure a crew and for him in his turn to pay the same to the boarding-house keeper, who brings the seamen to him; or for merchants of a particular locality engaged in the whaling trade to accept the bills of their masters drawn for supplies furnished abroad.

"When a practice, affecting a particular branch of business in a given locality, ripens into a usage of trade, it is evidence of the intention of the parties engaged in such business to make their contracts in reference to it. The competency of such evidence is an exception to the general rule of evidence, since by it a new provision or stipulation is sought to be engrafted upon the written contract of the parties which cannot be done by evidence of an actual contemporaneous verbal agreement between them. Hence it behooves courts to be exceedingly watchful lest this exception should be extended so far as either to make a new and different contract of an existing written one by poorer evidence, or entirely to defeat it and render it null and void. The danger thus to be apprehended in such cases was foreseen and stated by Judge Story, in The Schooner Reside, 2 Sumn. 569, in which he says: "I rejoice to find that of late years the cases of law, both in England and America, have been disposed to narrow the limits of the operations of such usages and customs and to discountenance any further extension of them." We will add that courts of law, since Judge Story's day, have not been unmindful of their duty in this respect, as the authorities we have cited abundantly show." Randall v. Smith, 63 Mo. 105, and cases cited.

A press despatch says that Judge Dyer of the United States District Court, sitting at Milwaukee, on the 12th inst., rendered an important decision in a trade-mark case. A demurrer to the jurisdiction raised the question of the constitutional power of Congress to legislate upon the subject. It was decided that the constitutionality of the trade-mark statute can not be sustained under the clause which gives to Congress the power to regulate commerce among the several States, nor under any of the provisions of the Constitution which prescribe the legislative power of Congress.

COVENANT OF WARRANTY — EXISTENCE OF PARAMOUNT TITLE.

SCOTT v. KIRKENDALL.

Supreme Court of Illinois.

[Filed at Springfield, June 24, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

IN this state there can be no recovery in an action of covenant for breach of the covenant of warranty, in a case where the land conveyed is and ever has been vacant and unoccupied, without showing more than an existing paramount title in another. There must be an eviction actual or constructive. Certain Illinois cases on this point explained.

SHELDON, J., delivered the opinion of the court:

On the 19th of May, 1871, appellees, by deed containing the ordinary covenant of general warranty, and the other usual covenants, conveyed to William H. Dewey, the south half of a section of land in Greenwood County, Kansas. Dewey afterwards conveyed the land to Dunlap and Robinson, as trustees, &c., who afterwards, in pursuance of a decree of court, conveyed the same to Edward Scott, the appellant, as their successor in trust. Scott brought this action of covenant against the appellee, upon the covenant of warranty in their deed to Dewey, alleging a breach thereof. Upon a trial by the court, without a jury, the issue was found in favor of the defendant, and a judgment rendered accordingly, from which the plaintiff appealed.

The facts, as presented by the evidence, are that, at the time of the execution of the deed by the appellee, they had no title to the land, but the paramount title to one quarter section of the land was still in the United States, and to the other quarter in one Holman, by virtue of a patent from the United States, issued on the 15th day of August, 1871. The land was vacant and unoccupied. Neither appellant, appellee, Holman or Dewey has ever had actual possession of any of the land. These are all the material facts bearing upon the point of a breach of the covenant of warranty.

The only question presented by the record, which we need to consider, is, whether there can be a recovery in an action of covenant for breach of covenant of warranty, in a case where the land conveyed is, and ever has been vacant and unoccupied, without showing more than an outstanding paramount title. The current of authority is in favor of the negative of the proposition. It is common doctrine, and well established, generally, that the mere existence of a paramount, legal title, which has never been asserted, can not amount to a breach of this covenant. The covenantee, or his assignee, must be disturbed in the possession actual or constructive; he must be evicted or there must be something equivalent thereto; and in the action the plaintiff must allege and prove an ouster or eviction by a paramount title. It is not necessary, however, that he should be evicted by legal process; it is enough that he has yielded the possession to the rightful owner; or, the premises being vacant, that the rightful owner has taken possession, 3 Washb. Real Prop. 406. Sedgwick on Damages, 6th Ed., 158 Marg.; Greenvault v. Davis, 4 Hill, 643; St. John v. Palmer, 5 Id. 599; Day v. Chism, 10 Wheat. 449; Marston v. Hobbs, 2 Mass. 433; Sprague v. Baker, 17 Id. 586; Jenkins v, Hopkins, 8 Pick. 345; Moore v. Vail, 17 Ill. 185; Mattison v. Vaughn, decided by the Supreme Court of Michigan at its January term, 1878, and see note to Foote v. Burnet, 10 Ohio, 319, for a collection of cases as to what amounts to eviction. This covenant of warranty is regarded as, in effect, a covenant for quiet enjoyment, and can only be broken by something equivalent to an eviction or disturbance of possession by the grantee. 3 Wash. Real Prop. 398. What will be held as equivalent to eviction, authorities may differ concerning; but there is a general concurrence that something more than the mere existence of a paramount title is necessary to constitute a breach of the covenant of warranty.

The cases cited by appellant's counsel from our own reports, of Beebe v. Swartwout, 3 Gilm. 162; Moore v. Vail, 17 Ill. 185; Claycomb v. Munger, 51 Id. 373; Wead v. Larkin, 54 Id. 499, as being supposed to sanction the doctrine that the action may be maintained upon the mere existence of a superior title in another, we regard as falling short of so doing. The last case has no particular application. Beebe v. Swartwout, and Claycomb v. Munger, affirm nothing more than that the covenantee may peaceably and voluntarily yield to the paramount title, not deciding that he may do so, when the adverse title has not been hostilely asserted. In Claycomb v. Munger, a mortgage existing upon land at the time of the execution of a deed with warranty, was subsequently foreclosed, and a deed executed to the purchaser under the foreclosure sale, and acknowledging that the covenant of warranty is broken only upon an eviction, or by something equivalent thereto, it was held that the grantee in the warranty deed might voluntarily yield to the superior title under the foreclosure sale, and purchase it for his own protection, and thereupon maintain suit upon his covenant of warranty. The decision was based upon the authority of Moore v. Vail, *supra*, among others. Moore v. Vail touches the precise question here involved, and is in direct opposition to the theory upon which this suit is sought to be maintained. It was an action upon a covenant of warranty. The court there, after laying it down that where the premises were in the actual possession of another, who held them under a paramount title, the covenant of warranty was broken, as also that if the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under paramount title, say: " This, however, is not to be understood as holding that the mere existence of a paramount

title constitutes a breach of the covenant, or that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that, by reason of such paramount title, and his want of possession, the covenant is broken; nor will it justify him in abandoning the possession without demand or claim by the one holding the real title. His possession, under the title, acquired with the covenant, is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him." And, again: "Until that time [the taking possession by the owner of the paramount title] he might peaceably have entered upon and enjoyed the premises without resistance or molestation, which is all his grantors covenanted he should do. They did not guarantee to him a perfect title, but the possession and enjoyment of the premises." We do not see but what this fully decides the present case against the appellant.

It holds that the mere existence of a paramount title does not constitute a breach of the covenant. That is all there is here. There has been no assertion of the adverse title. The land has always been vacant. Appellant could at any time have taken peaceable possession of it. He has in no way been prevented or hindered from the enjoyment of the possession by any one having a better right. It was but the enjoyment and possession of the premises which was assured to him, and there has been no disturbance or interference in that respect. True there is a superior title in another, but appellant has not "felt its pressure upon him." To sustain the present action would be to confound all distinctions between the covenant of warranty and that of seizin or right to convey. They are not equivalent covenants. An action will lie upon the latter, though there be no disturbance of possession. A defect of title will suffice. Not so with the covenant of warranty, or for quiet enjoyment, as has always been held by all the best authorities. See, too, Rawle on Covenants for Title. 235. 271.

We regard the judgment as right, and it is affirmed.

RAILROADS — NEGLIGENCE — DEFECTS IN TRACK AND CONSTRUCTION OF CARS — EVIDENCE.

GRAND RAPIDS & INDIANA R. R. CO. v. HUNTLEY.

Supreme Court of Michigan.—October Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }
" T. M. COOLEY, }

1. OPINIONS OF PERSONS RIDING IN RAILWAY CARRIAGES, who are not shown to have a special fitness for judging of the speed the train is moving, are not admissible on that point.

2. EVIDENCE OF DEFECTS IN TRACK. — Where a railway accident is alleged to have occurred in consequence of defects in the track, evidence of defects at other points than where the accident took place, is immaterial.

3. EVIDENCE OF THE GREAT VALUE OF THE CARS is not admissible as tending to show that the railway company were not chargeable with negligence in running them.

4. A CONDUCTOR OF EXPERIENCE IS COMPETENT to express an opinion of the fitness of the ties over which he runs his trains.

5. INJURY—EVIDENCE OF ATTENDING PHYSICIAN. —Where one who has suffered injuries for which he claims damages, calls in a physician for the purpose of an examination of his injuries, the physician may testify concerning them. Expressions and exclamations of pain made during the examination can not be testified to by the physician.

6. COMPANY NOT LIABLE FOR LATENT DEFECTS. —Where a railway company procures its cars for the carriage of passengers from manufacturers of established reputation, and an injury occurs in consequence of hidden defects which examination by the company would not have discovered, the company is not responsible for such injury.

CAMPBELL. J., delivered the opinion of the court:

Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the injury was permanent. Testimony was introduced bearing upon the condition of the cars and track, and the speed of the train, as well as concerning the character of the injury. The principal questions arise upon the medical testimony and upon the charge; although some other points are presented.

We do not consider it necessary to dwell minutely on the testimony of speed. It was held in D. & M. R. R. v. Van Steinberg, 17 Mich. 99, that questions touching the speed of trains were not properly scientific inquiries, and were not beyond the competency of ordinary witnesses who had means and habits of observation. In this case it may be doubted whether the witnesses were all near enough to observe, and some of them gave no such data as to indicate what the speed was except as to its comparison with ordinary rates. It would be going too far to hold that any increase over ordinary speed was evidence of danger or of negligence. The testimony should at least show approximately what the real rate was, and that it was faster than safety warranted, before the case should be allowed to go to the jury on such a point. The well known liability of all common observers to be deceived as to the rate of speed of heavy trains, renders it necessary to guard as far as possible against vague testimony, which cannot be directly met or corroborated by the proof of per-

sons having actual knowledge on the subject. Testimony of actual speed is tangible, whatever may be the value of the opinions of particular observers; but opinions on relative speed, without some standard of rapidity are of no value by themselves. In regard to opinions of persons riding in the cars, and not observing from the outside, we are not prepared to say they may not be received, but we think they should be excluded unless the witnesses first show such extended experience and observation as to qualify them for forming such opinions as would be reliable. It is not presumable that ordinary railway travelers usually form such habits.

We are also of opinion that no defects in the track could be relied on to show negligence contributing to the accident except those existing where the track was injured or displaced, and that testimony as to the condition of the road away from the scene of the injury was improper to make out a cause of action, and could only tend to raise false issues. The testimony should be confined to the time as well as place of the accident.

We think there was no error in excluding testimony of the cost of Pullman cars and other stock. The law will not allow negligence to be presumed without proof of actual negligence. All speculations as to the antecedent probabilities must yield to the facts; and if such speculations can be indulged in, there would be no end to inquiry. It is easy to imagine a great variety of circumstances which might induce some persons to take more care than they would under others; but it would be a very strained presumption that carriers of passengers must be expected to care more for the safety of cars expensive or inexpensive, than for the lives and limbs of those who travel on their trains.

The fitness of ties for use is a matter which a conductor of several years' standing must be presumed to understand. His position is a very responsible one, and if he has not familiarized himself with such things as are customary in railway construction, he can hardly have used his eyes to much purpose.

The nature of the injury which Mrs. Huntley suffered became a leading subject of discussion. There was no apparent dispute concerning the original suffering of a slight wound on the head and the dislocation of a shoulder, which was at once set. The chief dispute was whether this dislocation involved any permanent injury, and also whether there was any injury to the spinal column which led to lasting trouble. Dr. Turner attended her a short time after the injury, and about ten days, after which she was left in charge of Dr. Ball. He visited her again about the time suit was begun, for the purpose of making an examination, and again about three weeks before the trial, or more than a year after the second visit. In each of the two latter visits he and another physician, Dr. Ball with Dr. Andrews, examined her without removing her clothing from her back and shoulder, and, as the testimony seems to show, made the examination by measuring the arm and shoulder in different positions, and pressing on the spine at various points. He asked no question about the spine, but she made complaint of pain above the shoulders. Upon this testimony of examinations, Dr. Turner was allowed to state what in his opinion ailed Mrs. Huntley, and whether it was permanent. His conclusion was that she received a spinal injury at the time of the accident by a sprain —such a concussion as produced laceration and effusion of blood, resulting in a pressure on the spinal cord interfering with the functions of the nerve fluid, and preventing the assimilation of food; that she had a good appetite, but could not digest her food, which results in emaciation; that she had urinary difficulties, which is always the case, and that was the condition he thought the woman was in; that the difficulty was permanent. There is probably some error in taking down some parts of the testimony, which, as it reads on the record, is rather blind and incoherent. But we have stated it as it was evidently designed to appear.

We think this testimony was inadmissible. No portion of it was the result of the witness' conclusions from his own examination, which, according to his statement on the stand, was purely superficial, and without inquiry as to any of the injuries or maladies beyond the local injury. He was not her attending physician for purposes of treatment, nor counseling physician for any such purpose; nor did he examine her for purposes of treatment, but merely as auxiliary to a law-suit. The case shows very fully, from his own statement, that he had no means of knowing or suspecting from any treatment or examination whether there was any spinal, or dyspeptic, or urinary difficulty, or of what nature, or when discovered or originating, or how caused. He does not state on what he based his conclusions, but he does show that he had no knowledge to base them on. They are not scientific opinions, which can only be founded on established facts. They do not purport to be hypothetical, and were not given in answer to any hypothesis founded on evidence. There is no testimony set forth in the record bearing on them at all. As the case stands, his views are mere guesses upon no basis of facts. They are also objectionable as covering disputed facts on which it was for the jury, and not for experts to decide. Dr. Ball, who was present with Turner on both of the latter examinations, testifies that he was not desired to make, and did not make, any examination beyond the shoulder, and knew of no further examination. He was asked and allowed to answer what expression Mrs. Huntley made at the last examination, three weeks before trial, and answered that she complained of pain, and that it hurt her. He also swore that the examination was for the purpose of giving testimony. His evidence further was not very strongly corroborative of Dr. Turner's view.

The question is raised on this, whether the expressions of pain were admissible as proof of actual suffering. It has been held several times by this court that statements of pain and of its locality, were exceptions to the rule excluding hearsay evidence. Hyatt v. Adams, 16 Mich. 180; Johnson v. McKee, 27 Mich. 471; Elliott v. Van Bu-

ren, 33 Mich. 40. These statements are admitted only upon the ground that they are the natural and ordinary accompaniments and expressions of suffering. It would be impossible, in most cases, to know of the existence, or extent, or character of pain without them. They are received, therefore, as acts rather than declarations, and admitted from necessity. The rule which admits declarations of present suffering has never been extended so as to include declarations either of past suffering, or of the causes in the past of such suffering, so as to make such statements proof of the facts. Declarations concerning the past are narratives, and not acts. Exclamations of suffering may be, and if honest are, parts of the occurrence itself. It is difficult to lay down any very clear line of admission or exclusion, where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion. But we can not think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were, therefore, made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor.

The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is, that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. Stockton v. Williams, Walker's Ch. 120; 1 Dougl. M. R., 546 (citing the Berkley Peerage case, 4 Campb. 401; Richards v. Bassett, 10 B. & C., 657; Doe *d.* Tilman v. Tarver. 1 R. & M., 141; Monkton v. At. Gen. 2 Russ. & Myl., 160; Whitlocke v. Baker, 13 Ves., 514. The language of Lord Eldon in Whitlocke v. Baker has met with general acquiescence. He says: "All are admitted upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth." P. 514. It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain, made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be hard to find a case more plainly within the mischief of the excluding rule.

The principal remaining questions arise out of the rules of liability established by the charge.

The primary cause of the accident was the broken axle. Some stress seems also to have been laid on the condition of the track and the rate of speed. So far as appears upon the record, we have not discovered any proper evidence to authorize these matters to be considered. There is no testimony from such persons as are qualified to give opinions on the subject, that either the condition of the road or the speed indicated negligence. Whether the structure of a road is such as to warrant fast travel, is not a question which usually belongs to ordinary witnesses, and it would be dangerous to allow a jury to act on its own suspicions or prejudices in such a matter. The road, if in such a condition as would be regarded as safe by railroad men of usual intelligence and experience, could not be complained of for any possible deficiencies which would not be regarded by competent persons as existing, nor could the rate of speed be properly held excessive without similar evidence from men of experience. It is a matter of daily occurrence in many parts of the country and of occasional occurrence everywhere, for cars to be run at very high rates of speed on railroad tracks. No particular rate can be assumed, without proof, to be dangerous.

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is we think entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability, therefore does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. M. C. R. R. v. Coleman, 58 Mich. 440; G. R. & I. R. R. v. Judson, 34 Mich. 506; Ft. Wayne, J. & S. R. R. v. Gildersleeve, 33 Mich. 133; M. C. R. R. v. Dolan, 32 Mich 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of

stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessaries as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examination, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of Richardson v. Great Eastern Railway Co., L. R., 1. C. P. Div. (Court of Appeal), is quite in point and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered in fact by such an examination as was customary, and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See also Daniel v. Metropolitan Railway Co., L. R. 5 H. L., 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no control.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in Readhead v. Midland R. W. Co., L. R. 4 Q. B., 379. The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact.

We think the judgment erroneous, and it must be reversed with costs and a new trial be granted.

MANDAMUS WILL NOT LIE TO COMPEL COUNTY COURTS TO ISSUE WARRANTS ON GENERAL REVENUE FUND OF COUNTY TO PAY JUDGMENTS ON RAILROAD BONDS.

STATE v. WALKER.

Supreme Court of Missouri, October Term, 1878.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Judges.

1. MANDAMUS WILL NOT LIE TO COMPEL A COUNTY COURT to issue a warrant on the county treasurer on the general revenue fund of county, to pay a judgment against the county on bonds issued for subscription of county to capital stock of Missouri & Mississippi R. R. Co.

2. UNDER SEC. 13 OF CHARTER OF COMPANY, said county court had no power to levy in one year a tax of more than one-twentieth of one per cent. upon assessed value of taxable property of county, and the bonds are payable only out of the special fund to be raised by taxation under that act and none other. That section entered into and formed a part of the contract, under which the bonds were issued, and operated as a limitation upon the taxing power of county as therein provided; holders of bonds can only look to fund which that section authorizes to be raised for payment thereof, and when that is exhausted they can not compel, by mandamus, a county court to resort to any other fund to effect such payment.

3. THAT THE BONDS AND COUPONS have been put into judgment can neither enlarge nor diminish the powers of the county court, in regard to providing for payment by levying a tax.

4. THE COMMON REVENUE FUND OF THE COUNTY derived from the taxes annually levied was created by law to defray the ordinary and current expenses of the county. It was not designed or intended to include therein an indebtedness incurred by a county in subscribing to stock of railroad company, and issuing bonds therefor: other and ample provisions for levying taxes and creating a fund for payment of such obligations have been provided by law; and a warrant for payment out of such common fund of such railroad debt would be illegal, and if knowingly done would subject the members of the county court voting for its issue to fine and imprisonment in the penitentiary.

5. MANDAMUS WILL NOT LIE TO COMPEL an officer to do an act not authorized: *a fortiori* will it not be awarded to compel such officer to do that which he is absolutely forbidden by law to do. Nor will such writ be granted when its effect would be to disrupt or disorganize subordinate municipal organizations, and thus impair the power of the state to maintain itself. Neither will it issue to require inferior tribunals to give particular judgments, or reverse their decisions, when they have once acted.

6. THE ACTION OF A COUNTY COURT in ascertaining the amount of indebtedness due from a county, and ordering a warrant on the treasury therefor, out of a particular fund, is judicial in its character, and can only be reviewed on appeal or writ of error. Mandamus is not the proper remedy.

NORTON, J., delivered the opinion of the court:

This is a proceeding instituted in the circuit court of Macon county, against the defendants, as justices of the county court of Macon county, to compel them, by mandamus, to draw a warrant on the county treasurer of said county, payable out of the general expenditure fund. It is alleged in the petition that the relator obtained judgment in the circuit court of Macon county for the sum of $3,645 against said county on certain bonds issued and delivered to the Missouri and Mississippi R. R. Co., in payment of a subscription of stock to said company, made under and by virtue of the charter of said company; that said judgment is unpaid, and that the county has no property out of which said judgment or any part thereof could be made on execution; that the levy of one-twentieth of one per cent. on the assessed value of the taxable property of said county is wholly insufficient to pay said judgment and other judgments now subsisting against the county on other bonds issued to said company; that the defendants, upon demand made, refused to issue their warrant to relator, in discharge of said judgment, to the county treasurer, payable out of the common fund of the county.

The defendants, in their return to the alternative writ, admit all the facts stated in the petition, and set up, by way of further return, that the stock was subscribed and the bonds issued to said company under the following provisions of the 13th section of said charter, which is as follows: "It shall be lawful for the corporate authorities of any city or town, or county court of any county desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year." That in and by virtue of the power thus conferred, and no other, the said county court, without a vote of the people, and against the wishes of a large majority of the people, subscribed, on the 16th of April, 1867, $175,000 to the capital stock of said company, and also on the 12th of April, 1870, made a like subscription of the further sum of $175,000, under the same authority and no other, without a vote of the people and against the wishes of nine-tenths of the voters of said county; that the county court of said county had levied, every year since such subscriptions were made and bonds issued, a special tax of one-twentieth of one per cent. on the assessed value of all the taxable property in said county, which tax has been regularly collected and applied to the payment of said bonds and interest; that the tax thus collected was wholly inadequate to pay all the interest on said bonds; that the constitution of 1875, sec. 11, art. 10, limits the power of the county court to impose a tax for county purposes to fifty cents on the $100 valuation; that sec. 165, ch. 118, Wag. St., provides that the "several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, but the tax shall in no case exceed one-half of one per cent. on all taxable property;" that the tax thus authorized to be levied constitutes the common fund of the county, and that the whole amount thus raised is necessary to pay the current and necessary expenses of conducting the county government, and that no part of this fund is applicable to a payment of relator's judgment, and that a withdrawal of it for such a purpose would disorganize the county government.

A demurrer to this return was overruled, and judgment was rendered for defendants, from which plaintiff has appealed.

The record presents for our determination the simple question, whether the common fund of the county, collected for the purpose of defraying the current expenses of the county government, is applicable to the payment of relator's judgment, and whether the county court can be compelled to draw a warrant on the treasurer, payable out of said fund.

Without stopping to consider or to determine whether, after a demand against a county has been put into judgment, mandamus will lie to compel the county court to issue its warrant on the treasurer in payment of the same, we will proceed to the discussion of the question presented by the record. The only authority upon which the relator relies for issuing the bonds is to be found in the 13th section of an act to incorporate the Missouri and Mississippi River R. R. Company (Acts 1865, p. 86), which declares that it shall be lawful for the corporate authorities of any city or town, or the county court of any county desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year." This section has been construed by this court in the case of State v. Shortridge, 56 Mo. 126. It was there held that section 13 of said act entered into and formed a part of the bonds themselves as much as if it had appeared *in hæc verba* on their face; and that the effect of said section was to limit the power of the county court to a levy of a tax of one-twentieth of one per cent. for their payment in any one year; and that this limitation was for the benefit of the tax payer, and forbids the imposition of any greater tax than one-twentieth of one per cent., in any one year, by the county court. The principle announced that section 13 of the act entered into the contract finds support in the case of Von Hoffman v. City of Quincy, 4 Wall. 554, and Cooley Con. Lim., 285. It was also held that the power of taxation belongs alone to the state, and can only be exercised by virtue of laws passed by the general assembly for that purpose, and that there can be no such thing as an implied power in a county court to levy a tax. We are disposed to adhere to the principles enunciated in that case, believing them to be supported both by reason and authority, and, adhering to them, we are forced to answer the question this record presents in the negative. If, as was decided in that case, the county court of Macon county could not be compelled, by mandamus, to levy a tax, in excess of one-twentieth of

one per cent., to raise revenue with which to pay such bonds, and the interest on them, as constituting the right of action on which the relator obtained his judgment, we are at a loss to perceive upon what principle the court could be compelled by mandamus to seize upon other funds in the treasury of the county, raised for another and different purpose, and apply them to an object not contemplated when the tax which brought the revenue into the treasury was imposed.

The fact that the bonds and coupons have been put into a judgment, can neither enlarge nor diminish the powers of the county court in regard to providing for payment by levying a tax. To compel the county court to divert the common fund of the county from the purposes for which they had the lawful right to impose the tax which produced these funds, and apply it to a purpose for which they had no lawful right to impose a tax beyond the limit prescribed by law, viz.: one-twentieth of one per cent., would be doing, indirectly and by evasion, what we have decided could not be done directly. We can give no toleration to such a doctrine. The very law authorizing the issuance of the bonds and coupons, upon which relator obtained his judgment, provided for raising a special fund, out of which they were to be paid. This law entered into and formed a part of the contract, and when the subscription was made, and the bonds issued to the company in payment of it, the company and all others into whose hands they might come, are chargable with knowledge of the fact that they were to look for payment to a specific fund to be provided by the levy of a tax not in excess of one-twentieth of one per cent. It is no answer to say that the fund provided is inadequate. The inadequacy of the fund to discharge the obligation can not confer either on the county court or any other court the power to provide any other fund to meet the obligation than that which the law, authorizing the contraction of the debt, had provided. If the county court, in subscribing $350,000 of stock, and issuing that amount of bonds to pay it, issued an amount in excess of what a tax of one-twentieth of one per cent. would pay, the company could have refused to accept the subscription on that ground. This, however, was not done.

The amount of bonds and interest that an annual tax of one-twentieth of one per cent. would pay, could have been ascertained almost to a mathematical certainty at the time the subscription was made and the bonds issued. Prudence on the part of the county court would have confined them to a subscription, and the issuance of bonds, to an amount which the fund authorized by the legislature to be raised would pay, and fair dealing would have required the company to have refused to accept a subscription in excess of what could have been paid by it.

The intention of the legislature, in conferring the power on the county court to subscribe stock to this company, to be exercised independent of, and even against the will of the tax payers, doubtless was to confine them to such a subscription in amount, as an annual tax of one-twentieth of one per cent. on all the taxable property would pay; and it may seriously be questioned whether the bonds issued in excess of that amount have any binding force.

If section 13 of the act of 1865 entered into and formed a part of the contract, which the court, in the case of State v. Shortridge, *supra*, declared it did, then it follows, under the following cases, heretofore decided, that the holders of the bonds can only look to the fund which section 13 provides, and, when that fund is exhausted, they have no authority of law to demand of the county court that they resort to another and different fund, provided for other and different purposes. In the case of Campbell v. Polk Co., 49 Mo. 214, it was held that, when a county warrant was made payable out of a particular fund, the holder of such warrant, after such fund had been exhausted, could not recover against the county in an action thereon. In the case of Pettis Co. v. Kingsbury, 17 Mo. 479, it was held that a contractor, who had built a bridge, to be paid for out of the road and canal fund, could not compel the county to pay a warrant (drawn payable out of said fund) with the common fund of the county. In the case of Kingsbury v. Pettis Co., 48 Mo. 208, the doctrine of the above case was affirmed.

Considering section 13 as entering into the contract in this case, as fully as if it had been copied on the face of the bond, the legal effect of it is to make the bonds payable out of the special fund there provided for that purpose, and to bring this case within the principle announced in the above cases. The contract made between the county and the Missouri and Mississippi R. R. Co. was that if the county court subscribed for stock in said corporation, the company would accept bonds therefor, to be paid by funds derivable from a tax of one-twentieth of one per cent. to be annually levied on the assessed value of all taxable property in said county. The record before us shows that this contract, thus made, has been fully executed. The county court made the subscription, which the company accepted, and it received the bonds of the county therefor, to be paid as section 13 of the act of incorporation provided, and the tax therein authorized to be levied has been regularly levied, and the proceeds, so far as they would go, have been applied to the payment of said bonds. If the contract and the law which authorized it to be made have been fully complied with, that is an end of the matter, and all that the plaintiff is entitled to. And if, for the purpose of paying these bonds, the county court of Macon county was powerless, as we have decided, to levy a tax exceeding one-twentieth of one per cent., it necessarily follows that they can not be forced to pay them out of funds raised by taxation for a different purpose. If this were allowed to be done, it would be equivalent to enlarging the powers of the county court, and giving them a right to levy a tax greater than one-twentieth of one per cent. for the purpose of paying these bonds, which this court, in State v. Shortridge, *supra*, held they could not do, but were forbidden to do. They could no more be compelled to pay a warrant drawn upon the treasurer,

payable out of the general fund, out of the fund authorized to be raised by section 13, *supra*, than they could be compelled to pay out of the general fund of the county a bond issued under section 13, which provides a special fund for its payment. It will not be pretended that the holder of a warrant, payable out of the general expenditure fund, could compel, by mandamus, the county court to take the special fund, which section 13, *supra*, provides for the specific purpose of paying the bonds issued thereunder, and apply it to the payment of such warrant, and we do not see how the holder of a claim, payable out of this special fund, can compel the county court to resort to the common fund of the county to pay it, any more than the holder of a warrant, to be paid out of the common fund, can enforce its payment out of this special fund.

The simple fact that the tax authorized to be levied will not bring sufficient money into the treasury to pay the bonds, will not justify us, in the language of Judge Scott, in the case of Pettis Co. v. Kingsbury, "by a kind of judicial midwifery to deliver the statute of an interpretation," which would give to the county court of Macon county, a power that, we have held, they could not, under the law, exercise. If the tax provided is insufficient to meet the payment of the bonds and interest intended to be paid by it, it demonstrates either a deficiency in the law which we have no right to remedy, or an unwise exercise of power by the county court in issuing a larger amount of bonds than the tax they were allowed to impose would pay, and the folly of the company in accepting such a subscription. It may have been a hard bargain, an unwise and imprudent contract, that was entered into between the county and the corporation it was contracting with. We have no power to change it, or to alter its terms. Our simple duty is to enforce it as the parties themselves have made it. The time may yet come when the sanguine expectations of the promoters of the project of the development of the county, and the increase of its wealth will be realized, and that the tax of one-twentieth of one per cent. will raise a fund adequate to the discharge of the obligation. We have a right to presume that a purchaser of these bonds, chargable with knowledge of the fact that the county court had no legal power to impose a greater tax than one-twentieth of one per cent. to pay them, would be governed by it, in fixing the price he would be willing to pay for such purpose. We also have a right to presume, from the fact stated in the return, and admitted by the demurrer, that only seventeen miles of the road was built, and this entirely outside of Macon county, that this fact was considered, and that the bonds brought but an inconsiderable sum.

To give section 13 the interpretation contended for by relator, would make it operate as a practical fraud, both on the county court and the people whose faithless agent the court was, if the fact, admitted by the demurrer, that the bonds were issued against the protest of nine-tenths of the people, be true. The county court, as well as the people, had a right to conclude that the legislature intended that, for the payment of the bonds issued by the county under the charter, the people should not be taxed beyond the limit prescribed in the act, and that, if they issued an amount of bonds in excess of what that would pay, then the company, as well as others, would take them at their peril, and subject to such future increase of the assessed value of property in the county as would ultimately secure their payment. In the case of Supervisors v. United States, 18 Wall. 77, it is observed that, "a mandamus will not be awarded to compel county officers of a state to do any act which they are not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. The office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing." The same doctrine as to the character of such officers is asserted in the case of Reardon v. St. Louis County, 36 Mo. 560. In the light of these adjudications, and to a proper determination of the question presented by the record before us, it is important to ascertain for what purposes the common fund of the county can be applied. This is especially so in view of the act of 1874, p. 45, which provides as follows: "That if any person, * * being a member of any court, * * shall knowingly vote for the appropriation, disposition or disbursement of any money or property, belonging to any such * * county, other than the specific use for which the same was derived, appropriated and collected, or authorized to be collected by law, * * such person, so voting, aiding or promoting such illegal appropriation, disbursement or disposition of any such money or property, shall be deemed and taken, if such illegal appropriation, disbursement or disposition of such property be in fact effected, to have feloniously embezzled and converted said money or property; and if such illegal appropriation, disbursement or disposition be not effected, then such person, so voting, aiding or promoting the same, shall be deemed and taken to have feloniously attempted to embezzle and convert to his own use such money or property, and, on conviction thereof, shall be punished by imprisonment in the penitentiary for a period of five years, and by a fine, not exceeding fourfold the value of such money or property."

What then are the purposes for which the general expenditure or common fund of a county is raised? A proper answer to this question can only be returned by the law which authorizes a levy of taxes to produce it. That law is to be found in Wag. St. 1193, sec. 165, and is as follows: "The several county courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for state purposes, * * but the county tax shall in no case exceed one-half of one per cent."

The revenue derived from the tax authorized to be annually imposed is, in the very terms of the law, declared to be to *defray the expenses* of the county, which we understand to mean the ordi-

nary current expenses incurred in conducting the county government, such as the payment of grand and petit jurors, witnesses summoned before the grand jury, costs of criminal prosecutions, expenses in support of the poor and insane of the county, salaries of officers, assessing and collecting the revenue, &c.

That an extraordinary indebtedness incurred by a county in subscribing stock to a railroad corporation, and in issuing bonds in payment, was never intended by the general assembly to be embraced in the words "expenses of the county," or that they contemplated the creation of any debt for county purposes, is manifest from section 166, which makes it the duty of the county court, after the assessor's book has been adjusted and returned, "to ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes so as to raise the required sum." If section 165, *supra*, was intended to authorize the creation of debts, or provide for their payment, the general assembly would doubtless have so expressed themselves, as they did in section 1 and 7, p. 1158, of the same law, in providing for the levy of state taxes. Section 1 provides that, "for the support of the government of the state, the payment of the state debt, * * taxes shall be levied on all property, real and personal;" and section 7 provides that, "there shall annually be levied, assessed and collected, on the assessed value of all the real and personal property, subject to taxation, in the state, one-fifth of one per cent. for state revenue, and one-fourth of one per cent. for the payment of all state indebtedness."

The state revenue thus provided is, in express terms, for the support of the state government, and the county revenue provided for in section 165 is for the payment of the expenses of the county government.

That such an extraordinary indebtedness as is incurred by a county in issuing bonds in payment of a railroad subscription, was not intended to be embraced in the terms "expenses of the county," is apparent, when it is considered that the very same words used by the general assembly in section 165, are to be found in section 20, R. S. 1852, 671, except in the latter act, the tax authorized was limited to fifty per cent. of the amount of state tax. The same section was contained in the Revised Code of 1835, except that the amount of tax was in no case to exceed the amount of state tax. It is also to be found in the code of 1845 and that of 1855, the only difference being that, in the former, the rate of taxation was not to exceed thirty-four cents, and, in the latter, not to exceed forty cents on the valuation of $100.

It is clear that the general assembly, in 1825 and 1835, when they authorized the county courts to levy such a tax, from time to time, as shall be necessary for defraying county expenses, could have had no reference to such indebtedness as arises from a county bond issued in discharge of a subscription to the stock of a railroad corporation, because at that time there was no law to be found on our books authorizing such subscriptions. The first statute conferring such authority was in 1837. Acts 1837, p. 247.

The identital provisions of the codes of 1825 and 1835, having been continued or transferred in the Revised Codes of 1845, 1855 and 1865, we are justified in concluding that they were transferred with the same meaning as when first adopted. and that it was not designed to include in the county expenses therein provided for, bonds issued by a county in payment of a railroad subscription. This conclusion, we think, is fully confirmed by the fact that, as early as 1855, the general assembly made other and different provisions for levying a tax and creating a fund for the payment of such obligations. This will be seen by reference to sections 30, 31, 32 and 34 of the R. S. 1855, vol. 1, p. 427-9.

Section 30 provides that it shall be lawful for the county court of any county * * to subscribe to the capital stock of any railroad company duly organized under this or any other law of this state.

Section 31 provides that when such subscription is made that, in order to raise funds to pay it, it shall be the duty of the county court making such subscription, to issue bonds or levy a special tax upon all "property and taxables" made taxable by law for state and county purposes, and upon the actual capital that all grocers and merchants may have invested in business, to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription. The only limitation on this is, that it shall not exceed in any one year, thirty per centum of the subscription.

Section 32 provides "that for such taxes levied the county court shall cause to be issued and delivered to the person paying such tax, a certificate for the amount thereof paid, which certificate shall be transferable and convertible into stock of the railroad, whenever presented in amounts equal to one or more shares of the stock of such railroad." It also declares that the assessment, collection and payment of the taxes authorized, shall be enforced as any other taxes for county or highway purposes.

Section 34 provides that "any county court or city which has heretofore subscribed to the capital stock of any railroad in this state, shall be entitled to the privileges and subject to the liabilities of other stockholders in such company, and the county court or city council shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts and cities under this act and may levy a special tax to pay the interest on their bonds or to provide a sinking fund to pay the principal."

Sections 17, 18, 19 and 21 of the Gen. Stat. 1865 p. 338-9, are in all respects like those contained in the Revised Code of 1855, except the power of the county court to subscribe is made dependent upon the assent to such subscription of two-thirds of the qualified voters of the county, expressed at a regular or special election to be held therein.

It thus appears that the fullest provisions have been made by the general assembly for the creation of a fund distinct from the general expenditure or common fund of a county, out of which to

pay an indebtedness incurred by a county on account of a subscription to stock of a railroad company, or bonds issued in payment thereof; which fund is to be kept separate from all other funds and to be applied to that identical purpose and none other. These various provisions of law have been referred to for the sole purpose of establishing the proposition, that for the payment of such obligations resort could only be had to the special fund, and that it never was the intention of the legislature that the common fund, raised by taxation to defray the expenses of the county, could be made chargeable with their payment, but on the contrary that such latter fund was devised, provided and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government as have been hereinbefore indicated.

We therefore think it is manifest that the fund raised by a tax of one-half of one per cent to defray the expenses of the county, cannot be applied to the payment of relator's demand, and it follows that each member of the county court of Macon county, who would knowingly vote for so applying it, and thus divert it from the purpose for which it was collected, would be guilty of a crime, and subject himself to the penalties of the act of 1874, *supra;* and as mandamus will not issue to compel an officer to do that which he is not only not authorized but absolutely forbidden to do, the trial court was justified in denying the writ.

Again, the demurrer was properly overruled, on the ground that the effect of granting the writ would be to disrupt and disorganize the county government. It is shown by the return that the taxable value of the property in the county was $4,853,584, and that the revenue, which a tax of one-half of one per cent. thereon would produce, is required in carrying on the county government; and after applying it to that purpose, there would be nothing in the treasury with which to pay a warrant, if drawn. In the case of Price v. County Commissioners of Philadelphia Co., 1 Wharton, 1, which was a proceeding to compel, by mandamus, the county commissioners to draw orders on the county treasurer in payment of certain claims against the county, it is observed by the court: "That it appears by the affidavit of the commissioners that there is no money in the treasury, except that which is wanted to defray the ordinary expenses of the county. The writ of mandamus is not of course. It will be granted when a plain case of necessity is shown, and when, in the discretion of the court, it appears advisable. In this we should probably stop the wheels of the county government, if the mandamus were allowed." The writ was denied.

In the case of Commonwealth v. Commissioners of Lancaster Co., 6 Binney, 15, which was a proceeding to compel the commissioners to draw an order on the treasurer for $58,444, the court observes, "that the commissioners say they ought not to draw the order, because there is not in the treasury sufficient to answer it. No doubt they speak the truth, and it appears to be cause insurmountable against issuing the writ. Whether the commissioners have done wrong in not taking measures to bring money into the treasury is not now the question. If they have, we have no power to punish them in this way. What would it signify to draw a warrant on an empty treasury? The treasury would refuse payment, and there the matter would end." The same principle is announced in case of Coy v. City of Lyons, 17 Iowa, 1; Coffin v. City of Davenport, 26 Iowa, 315; 36 Iowa, 401; and also in sec. 352, High Ex. L. R. At the time the subscription was made and the bonds of Macon county were issued in payment of it, sec. 165, *supra*, was the only law authorizing the county court to levy a tax to raise money out of which to defray the expenses of the county, and this tax could not exceed one-half of one per cent. Under sec. 11, art. 10 of the constitution, it is provided that the annual rate of taxation on property in counties having six millions of dollars or less, shall not in the aggregate exceed fifty cents on each hundred dollars valuation. While this restriction applies to taxes for county purposes, it is expressly provided in the same section, "that it shall not apply to taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness."

It is therefore manifest that the county court of Macon county (the property in said county being less than six millions of dollars in valuation), cannot levy, nor be authorized to levy for county purposes, a tax in excess of one-half of one per cent. in each year. It is also manifest from the return that if the fund arising therefrom is diverted from such purpose, that the county government will be overthrown and left without support. When it is considered that the state is dependent upon the machinery of its county governments for the assessment and collection of taxes for its support, and the payment of its debt, we cannot so exercise our discretion as to direct the issuance of a writ in this case, and thus establish a principle tending to overthrow the county governments, and thus to impair the power of the state to maintain itself. The writ was properly denied to relator because the principles of law governing courts in granting it do not accord it to him.

The office of mandamus is "to compel the performance of ministerial acts, or is addressed to subordinate judicial tribunals, requiring them to proceed to exercise their functions and give judgments in cases before them. Mandamus will not lie to compel an inferior tribunal to give a particular judgment or to reverse its decision when it has once acted, its peculiar scope and province being to prevent a failure of justice from delay, or refusal to act. When the subordinate tribunal acts judicially, it may be compelled to proceed; but it will be left to decide and act according to its best judgment. In such cases, the party aggrieved by the decision has his remedy either by appeal or writ of error, and mandamus never issues, except where the petitioner has a specific right and no other remedy." State v. LaFayette Co., 41 Mo., 224.

It therefore becomes important to determine whether defendants in discharging the duties im-

posed upon them of ascertaining the amount due from the county and ordering a warrant on the treasurer therefor, were acting judicially or ministerially.

The answer to this question is to be returned by the law which imposes the duty, and it is as follows: "When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor, in the following form: 'Treasurer of the county of ——, pay to ——, —— dollars, out of any money in the treasury appropriated for county expenditures (or express the particular fund, as the case may require). Given at the court house, this —— day of ——, 18—. By order of the county court. Attest: C— D——,Clerk. A— B——, President.'" (Sec. 31, Wag, stat., 415).

Under this section, before any warrant can be drawn on the treasurer the court must first ascertain the amount due, and the fund out of which it is to be paid, and under sec. 28 of the same act, it is clothed with all necessary judicial power to perform the duties thus devolved upon it. We therefore think that in the ascertainment of what is due from a county, and the fund out of which it is to be paid, (both of which must be determined before a warrant can be drawn), the court is acting judicially. This principle is fully enunciated in the case of International Bank of St. Louis v. Franklin Co., 65 Mo. 112.

When a demand against a county is presented to the county court, the usual form of entry may be exemplified thus: "A— B——, vs. —— County. The account of A— B——, for the sum of —— dollars, having been presented and inquired into, it is found by the court that the sum of —— dollars is due him from the county, payable out of (the general expenditure fund, or road and canal fund, bridge fund, railroad tax fund, interest fund, as the case may require), and for which the clerk is ordered to issue a warrant."

One of the judicial functions we are called upon in this proceeding to perform for the county court is, to determine the fund out of which relator's claim is payable, and then command the court, not to proceed and render a judgment, but to execute the judgment rendered by this court. This, under the authorities, we cannot do. The utmost that we could do, would be to direct the county court to proceed and render judgment when they refused to act, and if in acting they render a wrong judgment, the remedy is by appeal, which is allowable under our statute from all judgments and orders from the county court when not expressly forbidden.

But conceding, only for the argument, that the county court in ordering a sum of money ascertained to be due from the county to be paid out of a particular fund, is acting ministerially, still the relator would not be allowed the writ of mandamus unless he had no other remedy, it being well settled that such writ only issues when the party has no other remedy. If in such case the county court err in directing the payment of such claim out of the wrong fund, our statute affords an ample remedy by appeal from the wrongful order, for it expressly provides that the circuit courts shall have appellate jurisdiction from the judgments and orders of county courts and justices of the peace in all cases not expressly prohibited by law. Sec. 2, Wag. Stat., 430.

It has been determined that this appellate jurisdiction of the circuit courts can be exercised by appeal. County of Boone v. Corlew, 3 Mo., 12; Lewis v. Nuckolls, 26 Mo., 279; Lacy v. Williams, 27 Mo., 280.

So that it appears, whether the county court in ordering the payment of a sum of money ascertained to be due from the county out of a particular fund, is acting either judicially or ministerially, the relator would not in either case be entitled to the writ, for if defendants were acting in the former capacity, we cannot control their judicial discretion by directing them to give a particular judgment, as the judgment that they shall render is for them and not for us to determine; if acting in the latter capacity, and they make an erroneous order, the party aggrieved has his remedy by appeal. It therefore follows that in either instance the writ of mandamus must be refused; in the first because we cannot thus interfere with judicial discretion, and in the latter because, there being a remedy by appeal, mandamus does not lie. United States v. Lawrence, 3 Dall., 42; Griffith v. Cochran, 5 Binney, 87; 14 East, 395.

We have been cited to the case of United States v. Clark Co., 6 Otto, 211, in support of relator's case. The opinion in that case, emanating from the highest recognized authority in this country, did not meet with the sanction of a large minority of the court. This, in connection with the fact tha it was expressly decided in the case of State v. Shortridge *supra*, that sec. 13 supra of the act incorporating the Missouri and Mississippi River Railroad Co. was a limitation on the power of the county court to levy a tax beyond the amount therein specified, and the further fact that the various acts to which we have referred herein were neither called to the attention of the court, nor considered, we are driven to a different conclusion from that announced in that case.

The judgment of the court in overruling the demurrer and refusing the writ is affirmed, in which SHERWOOD, C. J., and HENRY, J., concur. HOUGH, J., concurs in a separate opinion. NAPTON, J., having been of counsel in the case of State v. Shortridge, did not sit.

HOUGH, J., concurring:

I concur in affirming the judgment of the circuit court refusing the writ of mandamus, but do not concur in all the reasons given therefor. I adhere to the decision of this court in the case of State v. Shortridge, 56 Mo., 126, and if this were a proceding to compel the county court to levy a tax to pay *the bonds*, it would be directly in point. I doubt, however, whether we are at liberty to go behind the judgment in favor of the relator, and inquire into the cause of action, or obligation, upon which it is founded, and then say that the judgment must be paid according to the terms of the contract upon which it is based. The judgment should have followed the contract, and in that it does not,

it is an erroneous judgment. It is a general judgment entitling the relator to a general execution, and if the county had property subject to execution, it might be sold thereunder. The contract is merged in the judgment, and it cannot in my opinion now be looked to, to determine the rights of the relator under his judgment.

Sufficient reasons are given in the opinion of the court for refusing the writ, without going behind the judgment in favor of the relator.

NOTES OF RECENT DECISIONS.

ATTORNEY'S LIEN ON LAND FOR SERVICES—WHEN NOT ALLOWED.—*Garner v. Garner*. Supreme Court of Tennessee, 4 Leg. Rep. 179. The solicitor of the defendant, in a suit to establish a resulting trust in the client's land, is not entitled to a lien on the land for the compensation due him for his professional services, although the suit be successfully defended. COOPER, J.: "The complaint sought to establish a resulting trust in land, the title to which was in the defendant, but the bill was dismissed at this term. The solicitor of the defendant now moves the court to declare a lien on the land in his favor for the compensation due him for professional services in conducting the defense. The language used in some of the cases seems to justify such an extension of the lien. But the question has been recently considered by the court, and the conclusion reached in unreported cases that the lien only exists in the case of the actual recovery of land by a suit instituted for the purpose, just as at common law, the lien was on the money judgment recovered. The lien is declared to exist from the commencement of the suit, manifestly contemplating a suit for the specific property, and the doctrine, although an extension of the principle of the common law, may be sustained upon the ground that the *lis pendens* is notice to all the world of the plaintiff's right, and no great harm can result from carving out of this right a lien in favor of the attorney running *pari passu* with the lien of *lis pendens*. But the *lis pendens* is no notice to any one of the defendant's rights, which stand precisely as if no suit were pending, and, consequently, a lien on that right, without contract, would be without any rule or analogy to support it, besides being in conflict with the policy of our registration laws. Perhaps the safer rule would be to hold that the lien can not be extended to services which merely protect an existing title or right to property, and only applies where there has been no actual recovery. It is sufficient in this case to rule that the solicitor of the defendant is not entitled to the lien, as the court has already done in the unreported cases referred to. The motion is disallowed."

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July Term, 1878.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

ACTION AGAINST OFFICER—CONTRACT.—In an action of contract to recover for services rendered to the defendant, a deputy sheriff, as keeper of certain property attached by the defendant, it appeared that the plaintiff was appointed by written appointment in the usual form; that no price was agreed upon; that he acted as keeper during the time alleged, and was then directed by defendant in a letter to deliver the keys and possession to the owner of the attached property. *Held*, that the plaintiff could recover. The right does not depend upon the right of the defendant to recover from another for the services rendered. Opinion by LORD, J.—*Stowe v. Buttrick*.

STATUTE—CONSTRUCTION—PROOF OF SIGNATURE.—Under the statute of 1877, ch. 163, providing that "any signature to a written instrument declared on or set forth as a cause of action, or ground of defense, or set-off in an action at law, shall be taken as admitted, unless the party sought to be charged thereby shall file in court within the time allowed for answer a special denial of the genuineness of such signature, and a demand that the party relying thereon shall prove the same at the trial," the defendant is not required to so deny the signature of an attesting witness to a promissory note, but the plaintiff must prove the same at the trial. Opinion by MORTON, J.—*Holden v. Jenkins*.

SET-OFF—EVIDENCE.—In an action for goods sold and delivered the defendant pleaded in set-off payments made to the plaintiffs for goods never received. There was evidence that the parties had had dealings for nearly two years; that during this period the defendant and the men in his employ had noticed that there was an unusual "shrinkage" in the stock used by him; that during three months he weighed the bales of goods sent him by plaintiffs, and found each bale to weigh less than as marked by plaintiffs; that defendant had no means of ascertaining the exact deficiency in the goods sold him by plaintiffs, except in the case of the bales weighed, but by estimate. *Held*, that it was properly left to the jury to ascertain from all the evidence what deficiency in weight was proved. Opinion by MORTON, J.—*Harris v. Thayer*.

WARRANTY — TITLE.— Action of contract on the covenants in a deed. The deed to plaintiff contained the usual covenants of warranty. Defendant's title was acquired under the will of his wife, which provided: "All the rest, residue and remainder of my estate, real, personal or mixed, I devise to my husband, G. for his comfort, support and maintenance during his natural life, and at the decease of my said husband, whatever of said estate remains unexpended by him, then I give and bequeath the same to my nieces." The estate was not yielding any income, and could not be made to do so without expenditure beyond defendant's means. *Held*, that defendant took an estate for life with power to sell and convey in fee, if necessary for his support. The facts showing such necessity, the deed from defendant to plaintiff passed an absolute title. Lyon v. Marsh, 116 Mass. 232; Bamforth v. Bamforth, 123 Mass. 280; Smith v. Snow, Id. 323; Gibbins v. Gibbins, 124 Mass. Opinion by GRAY, C. J.—*Johnson v. Battelle*.

WILL—CONSTRUCTION—TRUST.—A testator's will provided that, "after payment of my just debts and funeral expenses, I give, devise and bequeath to my said executrix (the tertator's widow) one-third of all my real estate to her sole use and behoof forever, together with all the furniture or personal property now in the house, and the other two-thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death as she deems best, and as they deserve." The personal estate proving insufficient to pay the debts, the real estate was sold by license of the probate court, and, after paying the debts, a balance was left of the proceeds of such sale.

Held, 1, that the widow took the fee in the one-third; 2, that she took at least an estate for life in the other two-thirds, with a power to convey the fee and to receive the proceeds; but the conveyance having been made, she was entitled to receive the remaining proceeds and to use them at her discretion for her support; 3, that no trust was created in favor of the children. Opinion by SOULE, J.—*Gibbons v. Shepard.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

December Term, 1877.

[Filed November 5, 1878.]

Hon. WILLIAM WHITE, Chief Justice.
" W. J. GILMORE,
" GEO. W. McILVAINE,
" W. W. BOYNTON,
" JOHN W. OKEY,
} Associate Justices.

BURGLARY IN CHURCH—INDICTMENT—DESCRIPTION.—1. In an indictment for burglary in a church, (74 Ohio Laws, 248) the ownership of the church must be averred. 2. An averment in the indictment that the burglary was committed in the "Saint Bridget's Church and Meeting House," is merely descriptive of the church, and has no reference to ownership. Judgment reversed. Opinion by GILMORE, J.—*Wilson v. State.*

PRACTICE—MODIFYING JUDGMENT—PETITION FOR REHEARING—BILL OF REVIEW.—1. Proceedings to modify a judgment prosecuted under section 535 of the code of civil procedure to correct an irregularity in obtaining a judgment or order, must be commenced within three years after the judgment or order was made. 2. The remedy by petition for rehearing authorized by section 56 of the act of 1831, directing the mode of proceeding in chancery, being inconsistent with the code of civil procedure, was not saved to suitors by the sixth section of the act of March 14, 1853, 1 S. & C. 383, "to amend an act relating to the organization of courts of justice and their powers and duties," passed February 19, 1852. 3. The remedy by bill of review does not exist in respect to an action commenced and prosecuted under the code. Motion overruled. Opinion by BOYNTON, J. Okey, J., having been of counsel, did not sit.—*Corry v. Campbell.*

EMINENT DOMAIN—DAMAGES—APPROPRIATION.—In an action to recover compensation for land appropriated by a municipal corporation to public use, the same rule applies for assessing compensation as is applicable where the assessment is made by a jury in a special proceeding instituted, under the statute, for the purpose. 2. A municipal corporation is authorized to appropriate an assessment in land abutting on a street, for the purpose of making a sloping fill in order to afford lateral support to the street. Such appropriation does not divest the owner of his dominion over the property subject to the easement. He may still use it for all purposes not inconsistent with the special purpose of furnishing the necessary support to the street. 4. Where such an easement has been appropriated, the land owner is entitled to be compensated for all the rights of which he has been deprived; but where he still retains substantial rights in the property, he is not entitled to be allowed the value of the lands in fee simple. Opinion by WHITE, C. J.—*Dodson v. City of Cincinnati,*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed November 6, 1878.]

Hon. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT,
" D. T. WRIGHT,
" LUTHER DAY,
" T. Q. ASHBURN,
} Judges.

NUISANCE—INJUNCTION—WHEN GRANTED.—1. On the petition of a land owner, complaining that certain steam power and machinery operated by another on adjoining land, is a nuisance, an injunction should not be granted, unless a clear case of nuisance and irreparable injury be made out. 2. When a party, who complains that a business lawful *per se*, is a nuisance, and affects his property injuriously by reason of the manner in which it is conducted, has an adequate remedy in an action for damages, he must establish his right to relief at law, before equity will interfere by injunction. Judgment reversed. Opinion by ASHBURN, J.—*Goodall v. Crofton.*

REMOVAL OF CAUSES—WHEN APPLICATION TO BE MADE—CONSTRUCTION OF STATUTE.—1. A person not a citizen of the state, in a court whereof he is sued, can not, under the 12th section of the judiciary act of Congress, of 1789, remove the suit to a Circuit Court of the United States, by reason of the citizenship of the parties, unless his petition for removal shows that the plaintiff was, at the time of the commencement of the suit, a citizen of such state. 2. Facts which are affirmatively shown by the record need not be averred in such petition for removal. 3. The act of Congress, of March 3, 1875 (U. S. stat. at large, 18, p. 470), so far as citizenship is concerned, makes the right of removal to depend on the parties being citizens of different states at the time of the application. 4. Under the act last named, the application for removal may be made by either party, at or before the term of court at which, under the laws of the state and the rules of practice, the cause would first regularly stand for trial, on its merits, upon issues which have been joined between the parties by their pleadings. Judgment reversed and cause remanded, with instructions to order its removal. Johnson, C. J., dissented as to the last proposition of the syllabus. Opinion by SCOTT J.—*Phœnix Life Ins. Co. v. Saettel.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Springfield, June 24, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

MORTGAGE—HOMESTEAD—ABANDONMENT.—Plaintiff in error executed a mortgage upon his homestead This was a bill to foreclose the mortgage. Defendant defends upon the ground that he was at the time illiterate and unable to read, and it was not explained to him before he executed it, and that he was not informed that it released his homestead, and further

that his wife never acknowledged the mortgage. The court, through WALKER, J., after discussing the evidence offered to prove the defense, say: "But from the evidence in the case, it does not matter whether Mrs. C signed or acknowledged the mortgage, or whether the acts were without her knowledge, as it appears from the evidence that the homestead was abandoned. Plaintiff in error had removed to and was residing in another county at the time he testified. Again, he testifies that he voted in Mason county. An intention entering into and forming a large element in fixing a person's residence, this act is almost conclusive in character. Nor is there any evidence tending to overcome this strong and almost irresistable conclusion. This case falls within the rule and is governed by the cases of 37 Ill. 230; 43 Ill. 169; 44 Ill. 474. In fact, there is less ground for holding there is no abandonment in this case than in those. We entertain no doubt that plaintiff in error abandoned the mortgaged premises as a homestead, and is precluded from asserting the right against this right or a sale under it. The homestead having been abandoned, it is immaterial whether plaintiff in error knew the fact that the mortgage contained a clause releasing it at the time of its execution, or whether his wife signed or acknowledged the mortgage." Affirmed.—*Cobbs v. Smith.*

REPLEVIN BOND—OFFER OF DEFENSE—RECITAL.—Appellee as constable levied a distress warrant on some property of A, and had received an execution for their sale. B, the appellant here, claimed the property, and a trial of his right was had, resulting in a judgment against him. He appealed and gave to the constable a replevin bond for the return of the property. The appeal was dismissed, and the constable demanded the property or the payment of the execution under which it was held. B refused to do either. Thereupon the constable brought suit for the use of the plaintiff in execution on the replevin bond, and recovered a judgment for the amount of the execution. B and the sureties appealed to this court, and among other grounds urge a reversal, because the court below prevented them from making proof of facts claimed to constitute a defense. WALKER, J., says; "Appellant offered to prove that there was no consideration for the bond; that the consideration had partially failed; that it had entirely failed. The offer was general, not specifying what the witness would state or the specific facts he could prove by the witness. In such a case, the offer should be to prove facts that would show a want of, or a total or partial failure of consideration; not as the offer was made here to prove a mere conclusion of law. Had the facts been specifically stated, it might have appeared that they would not tend in the slightest degree to establish either defense. An offer was made to prove there never was any such case before the justice of the peace, as that recited in the bond. Appellants were estopped by their solemn admissions in the bond from making the proof." Affirmed.—*Lucas v. Beebe.*

BOND—SURETIES—LIABILITY CLAUSE OMITTED.—This was a suit on a bond in the following words: "Know all men by these presents, that we, A as principal, and B and C as sureties, are held and firmly bound unto D in the sum of * * * * The condition of this obligation is such that whereas the above-named A has made, signed and executed a certain contract with the above-named D (then follows the contract); then this obligation shall be void, otherwise to be and remain in full force and virtue." etc. The only question which arises here is, whether an action can be maintained on the bond against the sureties. The court, through CRAIG, J., say; "As has been suggested, the bond must receive a reasonable interpretation, but in order to arrive at the intention of the parties at the time the bond was executed, we must resort to the language used by them in the obligation which they executed. A court of law has no right to presume contracting parties intended to insert in a written contract a provision different from that which the plain language used would indicate, and then give a construction to the contract which would be legitimate if the contract contained the supposed omitted provision. Such a practice would, in effect, be making contracts for parties which courts are powerless to do, as was said in 25 Ill. 233. The condition of the bond contains a bare recital that a certain contract had been made by which certain things were to be done, and concludes by saying 'then this obligation shall be void; otherwise to remain in full force.' It needs no argument to show that the parties who executed the bond incurred no liability. Had the condition after reciting the contract contained a clause usually inserted something like the following: 'Now if the said A shall well and truly keep and perform the agreement aforesaid,' etc., the liabilities of the parties would have been fixed." Affirmed.—*Fitzgerald v. Staples.*

BOOK NOTICES.

THE PRINCIPLES OF EQUITY. A Treatise on the System of Justice administered in Courts of Chancery. By GEO. TUCKER BISPHAM. Second Edition. Philadelphia: Kay & Brother. 1878.

In the first volume of this JOURNAL, in a review of the first volume of this work, we said: "Our examination satisfies us that, all things considered, it is probably the best book to be first placed in the hands of American students of equity law. It should precede, in a course of reading, the more elaborate works of Story, Spence and Daniell. It has its value also to practitioners, in the great attention which the author has bestowed upon the recent equity decisions of the House of Lords and Chancery Courts of Great Britain. This is a marked feature of the work, and gives it an especial value, as many of these decisions are of general and great importance, and have not yet found their way into the text-books in common use." And these remarks apply still more forcibly to the second edition now before us. Its plan and arrangement have not been altered; the sections are numbered as formerly, and the order of the chapters retained. But extensive and valuable additions have been made to several of the chapters—to those on the rise and progress of the High Court of Chancery, on the Maxims of Equity, on Equitable Assignments and Notice. New cases and illustrations have been added, and no recent changes in the law have been overlooked.

The volume now contains 650 pages, including the index. The typographical work is good. Mr. Bispham's work must—if it has not already—soon take its place as pre-eminently the American law students' hand-book on the Principles of Equity. It may, we think, be said with truth that it will fill the place in the libary of the student here that is filled in England by the scholarly and incomparable work of Mr. Snell. Greater praise than this no text-book on Equity can have.

INTRODUCTION TO AMERICAN LAW, designed as a First Book for Students. By Timothy Walker, LL.D., late professor of law in the Cincinnati College. Seventh Edition. Revised by HON. M. F. FORCE. Boston: Little, Brown & Company. 1878.

It is now over forty years since Walker's American Law was first offered to the public. At that time the only works, of general scope, on the subject of American Law, were Hoffman's Legal Outlines, the last edition of which appeared in 1848, Hoffman's Course of Legal Studies, the last edition of which appeared in

1836, and Kent's Commentaries. The latter was not designed as a first book of law; it presupposes some elementary knowledge, both of terms and principles. Judge Walker's work was the first attempt to give a comprehensive but simple outline of the whole body of American, as distinguished from English, law, adapted to the use of first beginners; covering so much of Blackstone as is retained in this country, omitting what is inapplicable, and adding what is peculiar to our jurisprudence. The result was a masterly exposition of American law, at once thorough and elementary; in style, clear and simple; in scope, comprehensive enough to show all the various branches of our law as a whole, and in their bearing on, and relations to, each other. In 1874 appeared the sixth edition of the work, edited by J. Bryant Walker, the author's son, whose valuable notes give the result of the decisions down to that time. The present (seventh) edition is edited by the Hon. M. F. Force, one of the judges of the Superior Court of Cincinnati, whose notes, though few in number, are excellent. Walker's American Law is in use in a number of law schools, and is, we think, without it its equal in legal literature as a first book for the use of students. W.

QUERIES AND ANSWERS.

[Correspondents in this department are requested to make their questions and answers as brief as possible. Long statements of facts of particular cases will be rejected Anonymous communications will not be noticed.]

QUERIES.

74. MEANING OF "SHYSTER.—A subscriber would be obliged to any member of the profession who could give the origin and exact meaning of the term "shyster."

Grand Rapids, Wis. W.

75. PROBATE SALE—PRACTICE.—1st. Is it essential to the continued validity of an order of sale of real estate, made by a probate court to pay debts of a decedent, that the administrator should report (whether he sells or not) at each succeeding term of the court, and get the order renewed? In other words, is it necessary that the probate court should renew the order of sale at each succeeding term of the court, in order to continue its validity? 2d. Can an administrator *de bonis non* sell the lands of his decedent under an order of sale obtained by his predecessor, the former administrator. If so, is it necessary that the order should be renewed to the administrator *de bonis non*.

Marshall, Mo. SUBSCRIBER.

ANSWERS.

No. 71.

[7 Cent. L. J. 359.]

1. The chancery court has no jurisdiction; the remedy is at law. 2. Money had and received might be maintained against B. See 6 Taunt. 110; 14 Ala. 415; 9 Ala. 803; 5 Pick. 193; 7 Pick. 133; 4 Ib. 449; 11 Ala. 263; 32 Ala. 524: 39 Ib. 293: 1 Hill, (N. Y.) 240. 3. But trover for the wrongful act of B would lie: he converted the note; plaintiff may waive the tort and sue in assumpsit for money had and received. 1 Chitty. pp. 100, 101, 107; 12 Vt. 212; 25 Wendell, 423; 7 Id. 198; 10 Johns. 175; Parsons on N. & B. (Ed 1876) vol. 2, p. 266, and note w. and p. 293 top and note; 27 Ala. 407; Id. 228; 15 Ala. 705; 6 Mass. 182; 8 Vt. 85; 4 Har. & McHen. 219, cited in Com. Dig. p. 290.

Selma, Ala. W. R. N.

The authorities are clear that an action of *trover* could be maintained in a case of this kind, and under all the circumstances surrounding this transaction I should resort to this form of action to enforce the rights of my client. *Vide*, 3 Johns. 235; 4 J. & Sp. 459; 20 N. Y. 76; 48 Barb. 581. I am also inclined to the belief that equity jurisdiction would attach herein on the ground of fraud. that being one of the favorite objects of equity jurisprudence—even under our statute forbidding a resort to equity where the remedy at law is plain and adequate. C. E. H.

Point Pleasant, W. Va.

NOTES.

CHIEF JUSTICE HORTON of Kansas, has been re-elected by a large majority to the position he now so ably fills. His term of office will be six years.—Attorney-General Devens has decided that a national bank cannot deduct as exempt from Federal taxation the bonds of the District of Columbia, which are issued under Federal legislation, and for the payment of which the United States is made liable.—The Commissioner of Patents reports 14,100 patents granted for the year ending June. Receipts, $734,888. Expenditures, $665,906; 1,505 trade-marks were registered.——The New York State Bar Association meets at Albany, on the 19th inst. The opening session will be held at Tweddle Hall, at 8 o'clock on the evening of Tuesday the 19th, when the President's Address will be delivered by the Hon. John K. Porter, President of the Association; and the Annual Address by the Hon. Samuel F. Miller, Justice of the Supreme Court of the United States, on the subject "Legislation in this country as it affects the Administration of Justice in the Courts; what it has been—what it ought to be." The second Session will be held at 10 o'clock on Wednesday Morning, the 20th, at which will be read papers as follows: By Grosvenor P Lowrey, of New York, on "Telegrams—their inviolability against disclosure, subpœna and search warrant"; by Elliott F. Shepard, of New York, on "Equalization of representation in the United States Senate"; by Irving Browne, of Troy, Subject: "A Plea for the Non-Political Lawyer"; by Hon. James A. Briggs, of Brooklyn, State Assessor, on "Taxation—should it be confined to real estate"; by Hon. George Shea. of New York, Subject; "Some Thoughts on Henry Wheaton and the epoch to which he belonged"; and by W. M. Ivins, of new York, on "Jurisprudence and Political economy." The annual dinner of the association will be given on Wednesday evening. ——Robert Alexander Harrison, Chief Justice of the Court of Queens Bench, of Ontario, (Canada) died on the ult. He was born in Montreal in 1833, called to the 31st bar in 1855 and elevated to the bench in January, 1876. He was the author of many important legal works and publications, including: Robinson and Harrison's Digest of Cases decided in the Queen's Bench and Practice Courts, from 1823 to 1851 (Toronto, 1852); the Common Law Procedure Act, &c., with notes of decided cases (Toronto, 1858; new edition, 1870); The Municipal Manual for Upper Canada. (Toronto, 1859; new edition, 1867; new edition, 1876); A Digest of all cases decided in the several Courts of Error and Appeal, Queen's Bench, &c., (Toronto, 1863). The deceased Judge was for some years the editor of the *Canada Law Journal*.